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IN THE

Supreme Court of the United States

October Term, 1906.

No. 144.

BERTON O. WETMORE, ADMINISTRATOR OF THE ESTATE OF CHARLES H. WETMORE, DECEASED, TO THE USE OF JOHN F. McKAY,

Plaintiff in Error.

vs.

JAMES L. KARRICK,

Defendant in Error.

MILLAN AND SMITH.
J. J. DARLINGTON.
For Defendant in Error.

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STATEMENT OF FACTS.

This is a writ of error from a judgment of the court below, overruling plaintiff's demurrer to defendant's second plea to an action of debt on a foreign judgment. The material facts of the case are as follows:

One Charles H. Wetmore, intestate of the nominal plaintiff, instituted suit against the defendant in error in the year 1892, in the Superior Court of Suffolk, Massachusetts, claiming $20,000 for certain alleged breaches of a contract between the parties. Various proceedings were had in the cause until the 12th day of June, 1899, when, there being a special verdict in favor of the plaintiff for $8,412.28, the

case was, at the call of the docket, dismissed by an order of the court, pursuant to its rules providing for such dismissal in cases in which no action had been taken within one year, which order, as is admitted by the pleadings in the case, was followed by a final judgment of dismissal on the first Monday of July, 1899. Thereafter, on October 18, 1900, which the pleadings further admit, was after an interval of more than five terms of the court, when more than two years had elapsed since any action had been taken in the said cause other than the said order and final judgment of dismissal, and more than fifteen months had passed since the order and judgment, the court, without summons, citation or notice of any kind to the defendant in error, or to anyone for him, and without his knowledge, assumed to strike out its said final judgment of July, 1899, and to restore the cause, on the ground that the same had been "dismissed improvidently, action having been taken within one year, but not discovered." Thereupon and thereafter, namely, on November 17, 1900, still without notice of any kind to the defendant, the court rendered judgment against him and in favor of the said Charles H. Wetmore for $12,-881.46, besides $40.46 costs.

On June 23, 1899, the defendant, who was then a resident of Colorado, filed his petition in bankruptcy in the United States District Court for that State, duly scheduling the debt sued upon in the Massachusetts action, and was duly discharged in bankruptcy by the said District Court from all his debts provable in bankruptcy at the time of the filing of his petition, which included the debt to the said Wetmore; and thereupon, after having obtained his discharge, he made inquiry of the Clerk of the Suffolk Superior Court as to the then status of the case, and was informed, in accordance with the fact, that the same had been dismissed, and was no longer pending against him, relying upon which dismissal he took no step to suggest his bankruptcy in said

suit, and was without knowledge of the subsequent proceedings therein until the action in the court below was brought against him, upon the judgment of the Suffolk Superior Court.

To the declaration in the court below upon the Massachusetts judgment, the defendant pleaded *nul tiel record*, and, as a second plea, the facts above recited, namely, the final judgment of dismissal in the Massachusetts court on the first Monday of July, 1899, his discharge in bankruptcy, his subsequent inquiry as to the status of the case, his ascertainment that the suit had been dismissed and was no longer pending against him, his consequent omission to suggest his discharge in bankruptcy in the said suit, its attempted restoration by the Massachusetts Court on October 18, 1900, after a lapse of five terms, without notice, of any kind, to him or to anyone for him and without his knowledge, and the subsequent rendition of the judgment against him in that court without process or other notice to him, or to anyone for him, without his knowledge, and without jurisdiction in the court, under the circumstances, to render the said judgment.

To this second plea, the plaintiff demurred on the ground, first, that the bankruptcy proceedings did not affect the jurisdiction of the Massachusetts Court over the original suit and the parties thereto; secondly, that the discharge in bankruptcy, having been granted prior to the rendition of the judgment sued upon, constitutes no defense; and, thirdly, that, the Massachusetts suit having been inadvertently dismissed by the court through a mistake of fact, the defendant was not entitled to notice of its restoration to the docket. The court below sustained the demurrer, which judgment was reversed by the Court of Appeals of the District of Columbia, and was followed by final judgment for defendant, the plaintiff electing to stand upon his demurrer, whereupon the plaintiff sued out his present writ of error to this court.

QUESTIONS NOT INVOLVED.

It may render clearer the consideration of the case to eliminate, preliminarily, certain questions discussed in the opposing brief, but which, it is conceived, are not involved in or relevant to the controversy.

1. The first and second grounds for the demurrer assigned (Record, p. 37) are, that the jurisdiction of the Massachusetts court was not affected by the bankruptcy proceedings in Colorado, and, secondly, that the defendant's discharge in bankruptcy, antedating rendition of the Massachusetts judgment, is not a bar to the present action upon the latter. Neither of these questions is raised by the plea, nor, although in the opposing brief the defendant in error repeatedly is declared "now to have abandoned these questions," has he at any time presented them (Record, p. 53). The fact that, after obtaining his discharge in bankruptcy, he inquired into the status of the Massachusetts suit for the purpose of pleading his discharge as a defense, that he then learned of the judgment of dismissal in his favor, and that its subsequent attempted vacation, the reinstatement of the cause and the rendition of the judgment against him were all without notice, affording him no opportunity to plead his discharge, are pleaded as showing the want of jurisdiction of the court, and the injury and injustice to himself, according to the numerous authorities, presently to be cited, which limit the jurisdiction to correct after the term, even in the case of judgments erroneous through clerical misprision or the like, to cases in which correction can be made without injustice to or hardship upon any party to the cause or to third persons.

2. The opinion of the trial justice (Record, p. 34) holds that, no order appearing in the Massachusetts transcript authorizing withdrawal by the attorneys for the defendants of their appearance in the action, it may be presumed that

they continued to be his attorneys, and that notice was served upon them, notwithstanding the fact that such service is not shown by the record. This position was, of course, inadvertently taken by the learned justice, in oversight of the fact that the plea avers and the demurrer admits that the original judgment was vacated and the judgment sued upon substituted for it without "summons, suggestion or notice of any kind to this defendant, or to anyone for him."

3. The opinion of the trial court further holds, at page 40, that it may "attribute the erroneous order made to the mistake of the clerk, either in recording the minutes or in reading the record"; and the opposing brief, at page 18, affirmatively asserts, upon this argument of a demurrer to a plea, that the judge "as a matter of practice in the courts of Massachusetts does depend upon information given him by the clerk."

The duty of the clerk is to make his record correctly represent the proceedings in the case, and this it neither is nor can be claimed that he failed to do in the case at bar. The disallowance of the defendant's exceptions at the sitting of July, 1898, which constitutes the action taken within the year claimed to render erroneous the judgment of dismissal, was duly noted, and the record discloses that the judgment was stricken out, not on the ground of any omission of proper entries upon the record, but upon the ground of "action having been taken within one year, but not discovered." It is further to be noted that the action taken within the year was, not any act of counsel, or of the parties, the court's knowledge of which depended upon proper filing by the clerk, but action by the court itself, and duly appearing upon its own minutes.

No Massachusetts statute is cited, and it is believed none exists there or elsewhere, making it the duty of the clerk to ascertain and report to the court the state of the record as the basis of judicial action. The courts may, in ascer-

taining the facts in a cause, rely upon the clerk, or upon counsel in the cause, or upon their stenographers where, as in the District of Columbia, the law provides the judges with such assistants, whether such facts are shown by the docket entries, by depositions in the case, or otherwise; but it is impossible to hold that these are clerical duties, imposed by law upon such assistants, for their errors in which the court may at any subsequent term, however remote, vacate, without notice, a final judgment in favor of one of the parties, and substitute another against him, also without notice or opportunity to be heard.

4. The opposing brief, at pages 15, 28, insists that the defendant, upon discovery of the proceedings in question, should have availed himself of the provisions of the Massachusetts statutes, under which any person against whom a judgment is rendered may apply for a writ of review within one year from the entry thereof, or, if rendered in his absence and without his knowledge, within one year from his first notice of it. The brief assumes, without support either in the record or in fact, that the defendant has omitted to seek relief under these provisions in Massachusetts, and that his failure to do so has some bearing upon the question, in this cause, whether the Massachusetts court had jurisdiction to do the acts complained of or not. The record shows that the defendant's first knowledge of the Massachusetts judgment was the bringing of the suit against him in the courts of this District, under whose rules he was compelled to submit a valid defense, supported by affidavit, or to suffer judgment against him within twenty days after the service of process, to which judgment no further proceedings in Massachusetts would afford him any adequate defense. Nor is it quite intelligible why a party, not a resident of Massachusetts and without assets or interests there, should be required or expected to appear and engage in litigation there over a void judgment against him in the

courts of that State, as the condition of being allowed to show its invalidity when sued upon it in the courts of his domicile.

The Massachusetts court either had the jurisdiction, five terms after rendering a final judgment in the defendant's favor and discharging him without day, to render another judgment against him in the same cause, without notice, or it had not such jurisdiction. The jurisdiction, if it existed, was not conferred by the provision of the Massachusetts statutes allowing any defendant one year after the rendition of judgment against him within which to apply for a review; if there were otherwise no such jurisdiction, it can not be claimed to have been conferred by those statutes. And see Imp. Co. vs. Duffy, 67 Iowa, 175.

If, in Pennoyer vs. Neff, 95 U. S., 714, in which case this court applied the doctrine that a judgment upon a money demand against a defendant over whose person the court was without jurisdiction is void outside of the state in which it was rendered, the laws of that state had given the defendant the right to come in within a year after rendition of the judgment and have it re-opened; could it have been argued that such statutory right affected, in any way, the question of jurisdiction?

The claim that the case at bar is distinguishable from the one supposed, because in the case at bar there was originally personal service upon the defendant, is really to beg the question in the case; namely, whether the court retained the jurisdiction over the defendant acquired by the service of process, after the close of the term in which it rendered final judgment in his favor and discharged him without day. If the jurisdiction was then lost, the fact that it had formerly existed is without importance.

5. That the judgment of dismissal in June, 1899, was a final judgment is, also, beyond dispute, being removed from the field of discussion by the explicit ruling upon that

question of the Supreme Judicial Court of Massachusetts itself.

Thus, in Pierce vs. Lamper, 141 Mass., 20, a suit had been brought upon a promissory note, and had been dismissed upon the call of the docket, under the same rule governing the dismissal of the present case, which order of dismissal, under the rules, should have been followed by the entry of a judgment of dismissal, in lieu of which the clerk made only an entry on his docket, "September 12, 1882. Dismissed on call." *Held,* That, since it was the duty of the clerk to enter the judgment of dismissal, it is to be deemed in law to have been actually entered; that it was a final disposition of the case, and that the court "had no power" to vacate it at any subsequent term, or in any other manner than by a writ of review to vacate, filed within a year, under the statute. The opinion concludes: "It follows that the Superior Court has now no jurisdiction of the action, and that it should be dismissed."

To like effect is Wood vs. Payea, 138 Mass., 61, in which case there had been a judgment by default against the defendant by a court, whose terms were weekly. There was a mistake in the process issued and served upon the defendant, in that it named neither the hour of the day when, nor the place where, the court would be held. At the next term of the court, which was only the following week, the case was re-opened because of the mistake in the summons, but this was reversed by the Supreme Judicial Court, holding that there was no power to vacate a judgment duly entered, on motion, after the term in which it was entered, and that, while the court may correct any misprision of the clerk or other mistake, it could not "vacate a final judgment entered without any error or mistake, *in accordance with the order of the court.*" There had been error or mistake by the clerk in issuing the summons, but the judgment had been correctly entered, as the court had rendered and had intended to render it.

CLERICAL ERROR OR MISPRISION.

In view of the discussion, in the opposing brief and elsewhere, of the cases in which, after the term, judgments and decrees may be corrected for clerical misprision or error, it may be well, also, to consider preliminarily what constitutes such misprision.

Chisson vs. Barber, 100 Ind., 1,

As shown by Makepeace vs. Lukens, 27 Ind., 435, at common law no amendment of any kind could be made after the term, for any purpose, or however formal it might be, the power of amendment being conferred by Stats., 14 Edw., III., 9 Edw. V., and 8 Henry VI., which gave authority to amend solely for "misprision of clerks." The court, in the case cited, say:

> "Under the authority of these statutes alone can amendments be made of the record when proceedings are no longer *in fieri*, and the term is past in which the record was made."

In Marsh vs. Nichols, 128 U. S., 605, 614-5, the Secretary of the Interior had omitted to sign letters patent granted for an invention; *held*, that this was not susceptible of correction as a clerical mistake. "A clerical error, as its designation imports, is an error of the clerk or a subordinate officer in transcribing or entering an official proceeding ordered to be entered."

So, in Leonis vs. Leffingwell, 126 Cal., 369, 372:

> "The test to be applied in determining whether an error in a judgment is of a judicial character, or a mere clerical mistake which may be corrected in the court where it was made at any time, saving intervening rights of third parties *and with due regard to equitable considerations*, is, whether the error relates to something that the trial court omitted to pass upon, *or considered and passed upon erroneously*, or a mere

> omission to preserve of record, correctly in all respects, the actual decision of the court, which in itself was free from error. If the difficulty is found to be of the latter character, it may be remedied as a mere clerical mistake, *which will not have the effect to change the judgment pronounced in the slightest degree, but merely correct the record evidence of such judgment.*"

In Villers vs. Parry, *et al.*, 1 Lord Raym., 182, a joint judgment had been given, and so entered, in an action upon a joint and several bond, the *scire facias* having been sued out against the defendants severally. Upon motion at a subsequent term to correct the judgment, making it several instead of joint, the court said:

> "If this had been a joint lien, the judgment may have been joint; but here the plaintiff by his several *scire facias* has made it a several lien, and therefore the judgment ought to be several. So it is plain error in law, and not amendable. But if it had been John for Thomas, this had been only *vitium clerici,* and amendable."

By the foregoing, and by authorities cited later and in the opposing brief, the following propositions are established:

1. No final judgment or decree can be amended at a term subsequent to its rendition, except for mere clerical misprision or error, which means error of the clerk to make the record speak the truth, or to show what judgment the court actually rendered or intended to render.

2. Even such errors can not be corrected where, to do so, would be unjust either to the adverse party or to third persons, at least without notice to the parties in interest and opportunity to be heard.

3. Any amendment of a different character, made without notice, is void, and may be attacked collaterally.

POINTS AND AUTHORITIES.

Omitting further consideration of the several matters above discussed preliminarily, except in so far as the propositions last stated are referred to and considered in the authorities now about to be cited, we come to the principal and practically the only question in the case, namely: Did the Massachusetts court retain jurisdiction after the term in which it had rendered a final judgment, in the defendant's favor, and had thereby dismissed him without day?

Many of the authorities cited in the learned and exhaustive brief for the plaintiff in error are cases in which no such question was presented or decided, and which owe their pertinence only to general expressions used by the courts in reasoning to the decisions, upon other questions, rendered in them. But "general expressions of opinion, which are not essential to the disposition of a case, are not permitted to control the judgment in other suits." Harriman vs. Northern Securities Company, 197 U. S., 244, 291.

Thus Phillips vs. Negley, 117 U. S., 665, is cited and quoted, at page 11, only because of its reference to *The Palmyra,* 12 Wheat. 1, in which case it was said that to reinstate a case dismissed by mistake is one of the exceptions to the rule, than which none, it is declared, is better settled, that "no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term at which they have been rendered." The only point decided in Phillips vs. Negley is that, after the term, a judgment by default can not be re-opened, citing for the general doctrine upon the subject Bronson vs. Schulten, 104 U. S., 414, 415. The Palmyra case, and the character of the mistake to which it refers, will be discussed later.

So, at page 13, the opinion in City of Manning vs. German Ins. Co., 107 Fed. Rep., 52, is quoted at length, al-

though the only point decided in that case was that the court erred in setting aside a judgment and granting a new trial upon a motion filed after the term at which the judgment was rendered. The opinion, in passages not quoted, declares that the exceptions founded upon mistake or misprision of the clerk, "relate only to mere clerical errors," and that the errors remediable by the common law writ of error *coram vobis,* for which a motion is now substituted, "are limited generally to the facts that one of the parties to the judgment had died before the judgment was rendered, or was an infant, or no guardian had appeared or been appointed, or was a *feme covert,* or that there was error in the process, through the fault of the clerk."

Among other cases cited by the plaintiff in error are Portis vs. Talbot, 33 Ark., 218, in which the decision was, only, that a judgment entered against two defendants upon an appeal bond, which only one of them had executed, was a clerical misprision, clearly shown by other parts of the record, and which could, therefore, be cured; while in Sheepshank vs. Boyer, 1 Bald., C. C. R., 462; Sherbourne vs. King, 2. Cr. C. C. R., 205, and McCormick vs. Lessee of Magruder, 2 Cr. C. C. R., 227, judgments by default were stricken out after the term, because rendered through misprision of the clerk in failing to enter the appearance of attorneys, duly ordered. In Chase vs. Whilton, 62 Minn., 498, the correction was of a clerical error in a decree declaring a mortgage void both as to principal and interest, when the accompanying opinion, filed in the cause, had, in terms, directed a decree declaring the mortgage valid as to principal and void only as to interest—the correction being upheld on the ground that it only made the court's records conform to the judicial determination which the court had in fact made and intended to make. In Morrison vs. Stewart, 21 Ill. App., 113, a "mere slip of the pen" by which costs were entered as awarded to the defeated plaintiff, in-

stead of to the successful defendant, was corrected as "a mere clerical misprision rather than a judicial blunder."

In Dick vs. MacLaurin, 63 N. C. 185, and Stacker vs. Cooper Circuit Court, 25 Mo. 401, it is held, simply, that the court may at a subsequent term set aside an "irregular" judgment—defined as "one entered against the course and practice of the Court," or such as might be recalled by a writ of error *coram vobis*. It is an "irregular" judgment in the sense of the North Carolina decisions, as further shown by Wolfe vs. Davis, 74 N. C., 597, namely, one rendered contrary to the course and practice of the courts, as a judgment without service of process, which can be set aside at a subsequent term; while a merely erroneous judgment, rendered according to the course and practice of the courts, but contrary to law, will not be set aside. The judgment of dismissal in the case at bar, therefore, was not "irregular," but "erroneous," and incapable of being altered at a later term. The court, in July, 1899, adjudged, and intended to adjudge, that no steps had been taken in the case during the preceding year, and that the case should be, and was, finally dismissed. The judgment was erroneous, but "rendered according to the course and practice of the courts," curable by appeal, by application to the court within the term, or by petition within the year under the Massachusetts statutes, no one of which steps was taken. Further, the correction undertaken by the court in October, 1900, was, not to make the record conform to what was done or intended to be done in July, 1899, but to what the court in October, 1900, thought ought to be done—being directly the reverse of what it did or intended to do five terms before.

The inapplicability of Nave vs. Todd, 83 Mo., 601, will be apparent by reading into the quotation from that case, at page 24 of the opposing brief, where the asterisks appear, the following sentence, which the asterisks represent: "The

effect of the record is the same, and the defendant was not prejudiced." If the correction or alteration here were of that character, the defendant would unquestionably be without valid ground or objection.

In Capen vs. Inhabitants of Stoughton, 16 Gray., 364, cited at page 13 of the opposing brief, a sheriff's jury in condemnation proceedings having agreed upon a verdict awarding damages in favor of the owners of the property condemned, by mistake signed it in favor of the municipality, on which judgment was rendered without discovery of the mistake. The question principally discussed in the opinion is whether the testimony of the sheriff's jury could be received to impeach the verdict actually filed. The court (p. 368) held that it was "a case of manifest mistake of a mere formal and clerical character, which the court ought to intervene to correct, in order to prevent the rights of parties being sacrificed by a too blind adherence to a rule of evidence in itself wholly salutary and reasonable, but which, on principle, has no application to the present case; and (at p. 565-6) that "when no action has been taken, and the *rights of parties to the proceeding or those* of third persons can not be affected unjustly by the correction of an error, the court has power to order *a motion* to be brought forward and a judgment to be vacated in order that an entry may be made in conformity with the truth."

In the case at bar, there had been action taken, namely, the intended pleading of the discharge in bankruptcy had been omitted, because of and in reliance upon the judgment of dismissal, and the rights of the defendant were affected unjustly in subjecting him to a judgment on a claim against which he had a valid defense, which defense he was deprived of the opportunity to present.

With respect to the text-book quotations or references in the opposing brief, 1 Tidd's Pr., 512, cited at page 22, is authority only for the proposition that irregularity in the

process, or in the notice to appear, etc., are to be brought to the attention of the court by motion, on proper affidavit, to set aside the proceedings. The reference is, manifestly, to notice given irregularly, and not to failure to give notice at all. Process and notice are treated as entirely alike; so that, if the plaintiff is correct in his view that the remedy of one against whom a judgment has been rendered in a cause once dismissed and then re-instated without notice is by motion to vacate, appeal or petition for a writ of review, then equally, upon this authority, only that remedy is available to one against whom judgment has been rendered without the service of process.

Freeman on Judgments, Sec. 135a., cited at page 18 of plaintiff's brief, is simply to the effect that, where jurisdiction has once been obtained over the person or the subject matter, no error or irregularity *in its exercise* can make the judgment void—not that, after the jurisdiction, though once acquired, has been terminated by a final judgment and the defendant dismissed without day, the court may at a later term proceed to annul that judgment and render another, against, instead of for him, and without regaining jurisdiction over him by some appropriate process or proceeding. The same author, at Section 98, says: "Judgment having been entered in an apparently legal manner, and the jurisdiction not being retained by any motion or proceeding taken, either during the term or within the time allowed by some statute, the court loses all control over the action and parties." And, again, at Section 103: "At the close of the term, the parties are dismissed *sine die,* and can no longer be regarded as being in court. Proceedings taken after that time to set aside a judgment must, therefore, be upon notice to all the parties interested."

Black on Judgment, Section 328, quoted, at page 21, to the effect that a judgment inadvertently or irregularly entered by *the judge* or the clerk *without any authority* may

be vacated at any time. The brief, although noting the fact that the author cites authorities for his text, does not refer to them, possibly for the reason that no one of them sustains the text with respect to inadvertent entries of judgments by the judge—though, if done "without any authority," it would, no doubt, be wholly void, and therefore proper to be disregarded by all courts—except, under decisions of this court presently to be cited, the court which rendered it. Of the authorities cited in the section of Black on Judgments referred to, Merrick vs. City of Baltimore, 42 Md., 219; Wharton vs. Harlan, 68 Cal., 422, and U. S. vs. McKnight, 1 Cr. C. C. R., 84, were cases of misprision on the part of the clerk. Wolfe vs. Shenandoah National Bank, 84 Iowa, 138, was a case in which the decree recited personal service upon the defendant, when the record showed that the service was not upon him, but upon his wife, the court holding, simply, that this jurisdictional fact, namely, the absence of personal service, might be shown, and, "when established in a proper proceeding, the judgment would be set aside." Coleman vs. Floyd, 131 Ind., 330, was the reversal of the lower court for refusing to set aside a judgment against defendants for non-appearance for trial at a court to which the venue had been changed without notice to them, and is, therefore, an authority in favor of, rather than against, the present defendant in error.

In Vanderpool vs. Vanderpool, 162 Pa. St., 394, the suit in which judgment was rendered had been brought without the knowledge or consent of the plaintiff, who joined with the defendant against whom it had been rendered in asking its vacation, and gave an order to enter it satisfied. There was no claim that its rendition had been irregular, or the result of inadvertence on the part of either the clerk or the court; but, nevertheless, the court refused to set it aside except on terms of satisfying persons who had become equitably interested in it.

Examination of the above mentioned authorities cited by the plaintiff, which embrace the major part of his citations, discloses, therefore, that these relate to the correction of judgments for clerical errors, or to judgments rendered "irregularly" in the sense of being contrary to the course and practice of the court, without legal authority or jurisdiction, as distinguished from judgments rendered through error in fact or law; and that, in them, the correction at a later term consisted in striking out or disregarding them where they were, not merely erroneous, but void—in all other cases, neither reversing nor modifying any judicial decision nor correcting any judicial error, but only making the court's record conform to the judicial determination which it had in fact made or intended to make—extending only so far as to make the record speak the truth, causing it to show what was done, and not what, at a later term, the court may be of opinion it ought to have done.

It is quite obvious that decisions of this character throw no light on the question now under consideration, namely: Whether a court, having rendered, though erroneously, a final judgment in a cause in favor of the defendant, discharging him *sine die* from further attendance, and the term at which such judgment was entered having expired without any motion or other proceeding to vacate the judgment or re-open the case, the court may, at any indefinite number of terms thereafter, vacate the judgment so rendered in the defendant's favor, and substitute for it a money demand against him, without notice or other opportunity to make defense.

We have next to consider whether the remaining citations of the plaintiff sustain the affirmative of this question, those authorities being *The Palmyra*, 12 Wheat. 1, Alviso vs. U. S., 6 Wall., 457; Sibbald vs. U. S., 12 Pet. 488, 492; Westervelt vs. Jones, 5 Kans. App., 35, and Hunt vs. Yeatman, 3 Ohio, 16.

The cases principally relied upon are *The Palmyra*, 12 Wheat., 1, and Alviso vs U. S., 6 Wall., 457.

The *obiter* in each of the authorities already considered, including Phillips vs. Negley, in support of "reinstating a case dismissed by mistake," as one of the exceptions to the well settled and practically universal rule that a court can not reverse or annul its final decrees or judgments for errors of fact or law at a later term, rests upon the former of these cases; and it becomes important, therefore, to ascertain the *kind* of mistake referred to in *The Palmyra* and in Alviso vs. U. S., as, also, whether those cases are authority for action, as in the case at bar, without notice.

As to the first of these questions, the mistake in both cases was caused by clear misprison upon the part of the clerk. *The Palmyra* case was dismissed because this court, upon looking into the record, found that, according to it, there had been no final decree below, and that, therefore, the case was not appealable. At the next term of the court, the appellant submitted a corrected transcript, showing that there had been a final decree, which the clerk through misprison had failed to include in the record; and it was for this mistake, not of the court, but of the clerk in making up the transcript of the record, that the order of dismissal had been made. So, in the Alviso case, this court, upon examination of the transcript of record, found there had been no citation signed and served upon the appellee, for which reason it dismissed the appeal; whereupon, at the succeeding term, it was shown that there had been such citation, duly signed, served and filed, and that it had been omitted from the record through error upon the part of the clerk.

With respect to notice, while the report of neither case shows that notice had been formally given, the report of the former case, in 12 Wheat. 1, and that of the Alivso case in 6 Wall., 457, show that the adverse party was present in court, when the applications to vacate the dismissal were

presented, and argued against them, making it plain that there was notice and the opportunity to be heard.

Upon the subject of notice, it is argued, on behalf of the plaintiff here, as below, that, if the court had the jurisdiction to reinstate at all, it could do so without as well as with notice; or, at most, that the omission to require notice was simply error, precluding collateral attack. As pointed out in the opinion of the Court of Appeals, however, at page 55 of the Record, this position is not maintainable. At common law the application must have been made by writ of error *coram vobis,* which writ must have been served in order to give jurisdiction to the court; and, this being true, it follows that the modern substitute for that writ, the motion, must be accompanied by notice, answering the purpose of the service of the writ. This being true, it follows that notice of the application is, necessarily, jurisdictional.

Further, in Rice vs. R. R. Co., 21 How., 82, upon precisely the same state of facts as in *The Palmyra,* namely, the dismissal of an appeal by this court because, upon inspection by it of the transcript, no final judgment appeared, and application at the next term of the court for reinstatement upon the showing that there had been a final judgment, which had been simply omitted by the clerk, the court held that, when the term at which the dismissal was ordered had closed, "that decision was final so far as concerned the authority and jurisdiction of this court under that writ"; and, to the argument that reinstatement had been ordered in the case of *The Palmyra* under precisely similar circumstances, the court distinguished the cases on the ground that Rice vs. R. R. Co., like the case at bar, was a common law action, while *The Palmyra* was an admiralty case, "where the power and jurisdiction of an appellate court is much wider upon appeal than in a case at common law, for in an admiralty case you may in this court amend the pleadings and

take new evidence, so as to make it in effect a different cause from that decided by the court below, and the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding are altogether inadmissible in a common law suit."

In the opposing brief, some distinction is attempted between *The Palmyra* and Rice vs. R. R. Co., on the ground that, in the latter case, the court simply held that the writ of error was *functus officio*, and that it was not returnable to the term at which the application to reinstate was made. These distinctions, however, are not the ground assigned by the court for the difference in the two rulings, nor do they serve in any way to distinguish the principle of the latter case from the case at bar.

The Alviso case, also, while not an admiralty case, was not a suit at law, but a proceeding of an apparently anomalous character, to approve a survey of a confirmed Mexican land claim. See 8 Wall, 337.

As before noted, Phillips vs. Negley, 117 U. S., 665, decided only that a default judgment could not be set aside upon a motion offered at a later term, and is cited only because of its reference to *The Palmyra* case. Sibbald vs. U. S., 12 Pet., 488, 492, also cited in Phillips vs. Negley, affords no support to the demurrer other than a similar reference to *The Palmyra* case, holding that, unless for clerical mistakes, or in so far as upon the authority of *The Palmyra* case a cause dismissed by mistake can be reinstated, no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, "from which it follows that no change or modification can be made that may substantially vary or affect it in any material thing." This citation, it is obvious, is fatal to the demurrer, if we are right in our contention

that *The Palmyra* case is not applicable to the facts and circumstances of the case at bar. The decision is explicit that no court can reverse or annul its own final decrees or judgments after the term at which they have been rendered, "for errors of fact or law." The controversy here is over an attempt by the Suffolk Superior Court to annul its own final judgment, and to substitute a diametrically different judgment for it, at the fifth term after its rendition, for an error of fact, proved by its own minutes, it is true, but not distinguishable in that respect upon any principle from an error of fact proved by depositions in a cause or other evidence of record.

The remaining decisions cited in support of the demurrer are from the state courts, and are even less applicable. Westervelt vs. Jones, 5 Kans. App., 35, was a suit in Kansas upon a New York judgment against L. M. Jones, J. L. Jones, and others. The transcript of the New York record showed a stipulation of dismissal as to L. M. Jones and J. L. Jones, followed by dismissal as to them, entered in accordance with the stipulation, notwithstanding which stipulation and dismissal the final judgment was against them as well as the other defendants. The court simply overruled a demurrer to the declaration based upon this ground, holding that, "in the absence of any showing to the contrary, it would be presumed that the case had been reinstated" as to the defendants Jones, giving them leave to plead, so that the contrary might be shown. The case, it will be seen, presents no question as to the power of the court to vacate the judgment after the term, whether with or without notice, nor any other question presented by the present record.

Hunt vs. Yeatman, 3 Ohio, 16, 23, holds that a judgment may be set aside at a subsequent term for irregularity. What the irregularity was, and whether there was or was not notice, does not appear in the case. In Reynolds vs. Stansbury, 20 Ohio Rep., 344, 353, however, the majority

opinion holds that there may be such action at a subsequent term, though it is necessary that the adverse party should have notice *in order to give the court jurisdiction*, and that, in the case of courts of general jurisdiction, the presumption in favor of jurisdiction should be indulged; while in the later case of Hettrick vs. Wilson, 12 Ohio St., 137, it is held that notice to the other party was necessary to give jurisdiction at one term to vacate a judgment rendered at a prior term, and that in such case the notice, being jurisdictional, could not be presumed, but must appear affirmatively. "A judgment, final in its character, had been rendered in the case at the May term of the court. By that judgment the defendant was acquitted, and dismissed without day. At the close of the term, he was no longer in court. No further action could be taken in the case prejudicial to his interests without notice to him. The plainest principles of justice as well as the provisions of the Code require this. * * * However far we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively, by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of complaint is that the party has had no day in court, and so had no opportunity of placing anything on the record."

It is true, as claimed at page 35 of plaintiff's brief, that in Hettrick vs. Wilson, the court also found notice to be required by a statute in force in Ohio; but, as will be seen from the above quotation from the opinion, and from the opinion itself, its decision was based equally upon the common law, and was not at all dependent upon the statute.

The foregoing summary embraces, it is believed, all the cases cited in the plaintiff's brief upon the proposition pre-

sented by this case, and which has already been so frequently stated, namely: Has the court, after having once entered a final judgment for the defendant, though through an error of fact, thus discharging him *sine die*, jurisdiction at a remote subsequent term, without notice to him, to annul the judgment in his favor and to render another, upon a money demand, against him in its stead? No one of the cases cited, it will be seen, goes to that extent, or is authority for that proposition; while the case last cited, Hettrick vs. Wilson, is precisely in point to the contrary, except that in that case the want of notice was presumed from the absence of evidence of it in the record, while in the case at bar want of notice is affirmatively averred in the plea and admitted by the demurrer.

Further Authorities on Behalf of Defendant in Error.

In Morgan vs. Campbell, 54 Ill. App., 242, it is held that, by an order of court dismissing the suit, the parties are out of court, jurisdiction over them is at an end, and they stand as they did before the commencement of the suit; and that, the jurisdiction having been thus once lost and the term passed, the record must show that it was regained, and how, and that the failure of the record to show notice of any motion to reinstate at a subsequent term, is fatal.

So, in Swift vs. Allen, 55 Ill., 303, an amendment to a decree, at a subsequent term, although made pursuant to a verbal notice to the defendant's solicitor, was declared, in a collateral suit, to have been a nullity. "The court acted without jurisdiction. It could no more impair his rights by an order made in the cause of an amendment, without first bringing him before the court, than it could do so by producing a new decree. The order making the amendment was not merely erroneous, as suggested by counsel. It was absolutely void for want of jurisdiction, and can be assailed in a collateral as well as in a direct proceeding."

So in Bryant vs. Vix, 83 Ill., 1: "By the order dismissing the cause, the parties were out of court, jurisdiction of the court over them was gone, and they stood as they were before the suit was commenced * * * Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis."

In Board of Commissioners vs. Brown, 14 Ind., 191, an appeal had been dismissed, and the cause reinstated at a subsequent term without notice. The court said: "Upon the dismissal of an appeal, the parties are no longer in court; and the refiling is the institution of a new suit, at least so far as to require that notice shall be given to defendant."

In Jenkins vs. Corwin, 55 Ind., 21, a judgment rendered at one term was set aside at a subsequent one, and a new trial granted. Upon the question of the validity of the subsequent judgment, being the same question we have here, the court said: "When the original judgment was rendered, and the term of court had passed, the parties were out of court; and no motion to set aside the judgment and grant a new trial could have been entered without notice to the opposite party. The order granting a new trial was made, apparently, without notice to the defendant in the original action; and, if so, it was not erroneous merely, but utterly void.

So, in Perkins vs. Hayward, 132 Ind., 95, 100, the court declares that, after a final judgment, the cause remains on the docket only to carry into effect the judgment actually rendered, not for any action modifying or changing it. After the term, "the court can make no order changing, modifying or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance."

And in Durre vs. Brown, 7 Ind., 127, 132, the court say: "After the term has closed and the proceedings have ceased

to be *in fieri*, no legal steps can be taken against any party who has a substantial interest in them *except after notice given*. See also Elsner vs. Shirgley, 80 Iowa, 30; Montgomery vs. Merrill, 36 Mich., 97; Stringer vs. Echols, 46 Ala., 61.

"A judgment is *finis litium*, and parties are not required thereafter to keep counsel on hand at the succeeding terms of the court lest an order affecting the judgment should be made." * * * While all orders and judgments are *in fieri* during the term at which they are made, and may be modified or set aside at such term without notice, after such term a final judgment cannot be set aside *except upon notice given.*" Harper vs. Sugg, 111 N. C., 327.

And so, in Kenny vs. Lyons, 21 Iowa, at p. 280, a motion to vacate an order dismissing a bill being granted at a subsequent term, without notice to the adverse party, the court declared it to be a violation of a fundamental principle of judicial proceedings. "After the original case was settled and dismissed, he was out of court, and was not bound, after the adjournment of the term, by anything that might be done affecting his interests, until notified of such contemplated action."

"After expiration of the term, however, the court has lost jurisdiction of the parties, and an order made upon motion, without notice, is void." 14 Encycl. Pl. and Pr., 27.

"A decree at a subsequent term vacating a final decree entered at the preceding term, and without notice to the other parties, is void on its face." Hook vs. Mercantile Trust Co., 89 Fed. Rep., 410—the question arising in a collateral suit.

Where there had been a final judgment in a cause, and no motion made or proceeding had during the term to set it aside, "the litigation was at an end upon the adjournment of the term, and the successful party discharged from further attendance." Hume vs. Bowie, 148 U. S., 245, 255.

And see Trust Company vs. Grant Locomotive Works, 135 U. S., 224.

At pages 8 and 9, and elsewhere in the plaintiff's Brief, it is reiterated that he does not wish to be understood as questioning in any way the proposition that a final judgment, entered "regularly and not through mistake or inadvertence," can not be vacated after the expiration of the term, and that this rule applies to judgments of dismissal as well as to any other judgments; but, it is contended, this rule does not apply to judgments of dismissal based upon mistake or inadvertence. No authority or reason is cited why judgments of dismissal differ in this respect from any other final judgments. U. S. vs. Sibbald, cited above, declares, in terms, that neither error of fact nor of law in the rendition of the judgment will confer such jurisdiction at a later term, except in the excepted cases, which, we submit, it has been shown are not applicable to the present case. Nor are authorities wanting in the precise case, namely, that of judgments of dismissal rendered through mistake, and sought to be vacated on that ground at a subsequent term.

In American Burial Company vs. Shaughnessy, 59 Miss., 398, 400, the trial court had dismissed the action at the first term after suggestion of the death of the plaintiff, because of the failure of appearance by the personal representative. This action was a mistake on the part of the court, the Code allowing the personal representative until the second term after the suggestion of death within which to appear. At a subsequent term, the court vacated the order of dismissal, and allowed the case to proceed to judgment. *Held*, that "an order of dismissal is a final judgment, and puts an end to the jurisdiction of the court"; that the judgment of dismissal was erroneous, but not a nullity; that it was "a final disposition of the case, and, until reversed on appeal, deprived the court *of all further jurisdic-*

tion over the subject-matter," and that, as a result, the order of reinstatement, and all subsequent proceedings in the case, *were void.*

In Jameson vs. Kinsey, 85 Mo. App., 298, the trial court had dismissed the suit because of plaintiff's failure to comply with an order to give security for costs, in forgetfulness or oversight upon its part of a statute which exempted him from such a requirement. Two terms later, the court granted his motion to vacate the judgment of dismissal and to reinstate the cause, without notice to the defendant, and followed this up by rendering a judgment in plaintiff's favor. A statute permitted the granting of motions to set aside judgments "for irregularity," if made within three years after the trial at which they were rendered. *Held*, that, in rendering the judgment of dismissal, the court did not violate any prescribed rule or mode of procedure, but simply committed an error of judicial discretion; that this ruling was regularly made, when it was in full possession of jurisdiction of the persons of the litigants and of the subject matter of the action, and might have been corrected upon appeal or writ of error; that it was not, consequently, an irregularity, but a judicial error, not correctible after the lapse of the term, even under the authority given by the statute to set aside a judgment for irregularity; and that the subsequent judgment vacating the dismissal and reinstating the cause "was a simple nullity, for want of jurisdiction to render it." To the like effect is Ewing vs. Perry, *et al.*, 35 Tex., 778.

Where the judgment entered was the one the court intended to enter, and the facts found were those which the court intended to find, there is no case of clerical mistake, and the case does not come within the rule that a court, after the expiration of the term, may amend the record by inserting what had been omitted by the act of the clerk or of the court. Hickman vs. Fort Scott, 141 U. S., 418.

In Wright, Petitioner, 134 U. S., 143, the court cite, approve and follow Section 1160, 1 Bish. Crim. Proced., as follows: "When the term of the court is closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, can not then be opened and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the *clerk,* proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined. In general, mere clerical errors may be amended in this way." In the case at bar, the act of the Massachusetts court in question was, not to supply any omission in the entry of what was done, nor to amend any clerical error, but "to undo, at a subsequent term, what was done at the former term."

In Grames vs. Hawley, 50 Fed. Rep., 319, the court held that an order of discontinuance, though made by the court in pursuance of an agreement fraudulently obtained by one of the parties, was in the nature of a final order, disposing of the case, exhausting the power of the court over the action and the parties, and that the jurisdiction could not be resumed over either at a subsequent term without a new proceeding, and the service therein of original process, citing a number of Federal and State authorities.

In Elder vs. Richmond Mining Company, 58 Fed. Rep., 536, an order vacating a judgment of dismissal rendered at a prior term, followed by a judgment for the plaintiff, was held to be "not merely erroneous, but was absolutely void for want of jurisdiction. This is not the case of the correction of a mere clerical error, or supplying a previus omission, or the amending of a judgment to make it conform to

the judgment actually rendered, or intended to be rendered, which may sometimes be done, upon proper notice. But the power of amendment after the term does not extend to the correction of judicial errors, or the rendition of a judgment which was neither in fact rendered nor intended to be rendered. (1st Black Judgm., Sec. 154.) In this case, no mere correction of a clerical error or amendment of a judgment was asked for, or attempted to be made. There was an entire annulment of the first judgment, and the rendition of another judgment, the very opposite of the one set aside. The case having been finally disposed of years before, it passed out of the court's jurisdiction; it could neither vacate the first judgment nor render a new one. The judgment of every court acting without jurisdiction is a nullity, and will be so treated in all courts in which it is sought to be used or relied on as a valid judgment."

In the above case, the original judgment of dismissal, the subsequent order of vacation, and the final judgment for plaintiff, were in a Colorado State court. The above decision by the Circuit Court of Appeals, Eighth District, was rendered upon a bill filed, in the Federal Court, to remove the apparent cloud created by the judgment upon the complainant's title. The court held that it was without jurisdiction to review errors in the State Court, but that the judgment vacating the dismissal, and the subsequent proceedings, were "absolutely void, as rendered without jurisdiction."

In Arrowwood vs. Greenwood, 5 Jones Law, 414, a defendant who had already filed a required bond was, through the court's overlooking the fact, put under rule to give such bond, the case dismissed for his omission to do so, and, at a subsequent term, a motion to reinstate was granted. *Held,* erroneous, and the order reversed, on the ground that the order of dismissal was, not void, but merely erroneous, "because of a fact which was not presented to the court, and of which it did not have cognizance. The only way such an

error could be corrected is by writ of error for matter of fact, in respect to which there is a specific time allowed by the court." In Arnold vs. Kendrick, 50 Ga., 292, a case was inadvertently dismissed for failure to pay certain taxes, the proof of such payment being then on file, but overlooked. At a subsequent term a motion to reinstate being overruled, the Supreme Court affirmed this action, declaring the dismissal to have been simply error, and to be remedied accordingly.

In no one of these cases, nor in Villers vs. Parry, 1 Lord Raym., *supra,* was the correction held maintainable on the ground of presumption that the clerk had failed to "read the record correctly" to the court, or that any such duty, clerical or otherwise, legally rested upon that officer.

In Hubbard vs. Welsh, 11 Ark., 151, a bill was inadvertently dismissed for want of an affidavit, no affidavit being in fact required by law. *Held,* that the order of dismissal could not be set aside at a subsequent term, being conclusive upon the parties after the term at which it was rendered, and not subject to revision.

In Jameson vs. Hilton, 85 Mo. App., 398, a judgment of dismissal had been inadvertently rendered for failure to give security for costs, the statute expressly exempting the plaintiff from such requirement, and another statute permitting application to set aside a judgment in any court of record "for irregularity," at any time within three years after rendition. The plaintiff moved to vacate, which motion was granted, and judgment entered in the plaintiff's favor. *Held,* that, while the dismissal was clearly error, it was not an "irregularity." "Such errors of judicial discretion are not correctible after the lapse of the term under the authority given by the statute to set aside judgments for 'irregularities.' * * * The judgment of the trial court setting aside its previous dismissal of plaintiff's action and rein-

stating the same, was a simple nullity, for want of jurisdiction to render it."

In Cameron vs. McRoberts, 3 Wheat., 591, a final decree had been rendered in a case in which the court had no jurisdiction, because the record did not exhibit a case of diverse citizenship; *held,* even in such a case, upon motion at a subsequent term to set aside the decree and dismiss the suit because of clear want of jurisdiction apparent on the record, that "the court had not power over its own decree, to set aside the same on motion, after the expiration of the term at which it was rendered." Surely a mistake by a state court in failing to recall or discover its own action in the cause within the year, involving no right of jurisdiction, but simply the propriety of a judgment of dismissal, does not present a case stronger than mistake by a federal court in failing to discover the absence of the necessary averment in the record of diverse citizenship, upon which its jurisdiction to render any judgment at all was wholly dependent.

"After the court has adjourned, its judgments, however erroneous, can not be reversed by the same tribunal, except for mere clerical defects or omission." Gibson vs. Wilson, 18 Ala., 63.

After the term, the only control of courts over their records is to "correct them so as to make them set forth whatever act the court performed." Printing Co. vs. Green, 52 Ohio St., 489, 493.

After the term, the power of courts over their records "is confined to errors and mistakes of their officials"; and the exercise of it "involves two requisites, first that there has been some action of the court which might properly and should have become part of the record in that cause; secondly, that the omission from the record was through the fault or mistake of the clerk." R. R. Co. vs. Holbrook, 72 Ill., 419.

Where the judgment entered was the one the court intended to enter, and the facts found were those the court intended to find, there is no case of clerical mistake permitting amendment after the term. "If errors exist, they can only be cured by such proceeding, by writ of error or appeal, as may be allowed in a court which, by law, can review the decision." Hickman vs. Fort Scott, 141 U. S., 415, 418-19 and citations.

In Bank of the United States vs. Moss, 6 How., 31, 38-9, after stating that the court may, after the term, set right mere forms in its judgments, correct misprisions of its clerks and irregularities in notices, mandates and similar proceedings, allow amendments permissible under the Statutes of Jeofails apply the verdict to a good instead of to a bad count where its minutes show the evidence offered to the former, or revoke entry of a mandate directed through mistake, arising from omission from the record of the marshal's return showing citation had not been served, this court declares: "Nothing else appears to justify the court in going back to a final judgment of a previous term and summarily setting it aside for an error in the law *or the facts,* and dismissing the whole case from the docket." Still less in summarily setting aside a judgment in a defendant's favor and entering instead a large money judgment against him.

It can not be necessary further to multiply authorities upon the question in controversy. It is plain that no one of the numerous authorities cited on behalf of the plaintiff in error affords support for his demurrer, under the facts of the present case, and that the authorities supporting the judgment of the Court of Appeals are numerous, pertinent, and in conformity both with legal principles and with the plainest requirements of justice.

The Right to Notice.

Upon this subject, discussed at pages 24 to 38 of plaintiff's Brief, enough has perhaps already been said. Where the correction consists merely in making the entry of the judgment conform to what the court did or intended to do, as shown by the record, it may well be in many instances that notice is unnecessary. Of this character are the cases, cited by plaintiff, of Odell vs. Reynolds, 70 Fed. Rep., 656 (see Record, 56); Groton Bridge Co. vs. Brick Co., 126 Fed. Rep., 552; Emery vs. Whitwell, 6 Mich., 474; Emery vs. Berry, 28 N. H., 473; Balch vs. Shaw, 7 Cush., 282; Mann vs. Schroer, 50 Mo., 306; Nave vs. Todd, 83 Mo., 601, etc. In Walden vs. Craig's Heirs, 14 Pet., 147, not only was notice held presumable (pp. 154-5), but the decision proceeded on the further ground that the amendments permitted were for the purpose of giving effect to the judgment, and that for this purpose, after the judgment, the parties are still in court—differing in this respect from a judgment of dismissal, which, on the expiration of the term, discharges the defendant without day and terminates jurisdiction over him. In few if any cases, even of this character, however, is notice held to be unnecessary, if the amendment really changes the legal effect of the judgment as originally entered.

Even where the correction is of the character stated, the jurisdiction to make it exists subject to the qualification that the rights of the parties, or of third persons, are not unjustly affected; it is to be exercised with great caution and with strict regard to the rights of others (Stickney vs. Davis, 17 Pick., 169), with due regard to the rights of parties and third persons. Moore vs. Hinnant, 90 N. C., 163. Where these are concerned, there must be notice to the parties in interest. R. R. Co. vs. Holbrook, 72 Ill., 419; Coughran vs. Gates, 18 Ill., 390.

The authorities cited by plaintiffs are to the same effect. "That notice thereof should be given to the party affected thereby seems but plain justice," Groton Bridge Co. vs. Brick Co., 126 Fed., 552. "The general rule is well established that a judgment can not be amended, after the term in which it was rendered, upon *ex parte* application. A proper notice must be given to the opposite party of the application and the relief asked." Black on Judgments, Sec. 164. When the rights of the parties to the proceeding can not be unjustly affected, the court has power to order an entry made in conformity with the truth. Capen vs. Stoughton, 16 Gray, 364. "All the subsequent proceedings, without consent, were *coram non judice* and void." Manning vs. Ins. Co., 107 Fed. Rep., 52.

Even during the term at which it is entered, the plaintiff can not have a judgment of dismissal set aside without notice to his adversary. Parker vs. Johnson, 20 Mo. App., 516.

In Blake vs. McMurtry, 25 Neb., 290, where a decree was amended after the term, without notice, *Held*, that the court had lost jurisdiction over the defendant by the original decree, and the amendment was void. And see Homan vs. Hellman, 35 Neb., 414.

In Insurance Company vs. Duffy, 67 Iowa, 175, the plaintiff had elected to stand upon an overruled demurrer, and judgment was accordingly entered for the defendant, whose attorney then left the court room, after which the plaintiff changed his mind and the court, without notice, set aside the judgment and gave leave to amend. *Held*, on *certiorari*, that, while the court's action, unlike that in the present case, may have been in accordance with substantial justice, the controlling question was one, not of substantial justice, but of jurisdiction; that, while the court retained jurisdiction over the defendant for the purposes of a motion for a new trial within the time allowed therefor, it ceased to

have jurisdiction over him otherwise, on entry of the final judgment in his favor, and that the expunging order was to be regarded as never having been made.

In the case last cited, the plaintiff urged that the defendant should have availed himself of his right, under a statute, to move to set aside the expunging order at the following term—just as the plaintiff in error here insists the defendant should have availed himself of his right of petition for review within the year after he discovered the action taken in October, 1900. The court said: "It is true the defendant, when it obtained knowledge of the order, might have moved the court at the succeeding term to set it aside. But the defendant was not bound to do this if the court did not have jurisdiction to make the order at the time it did so."

In Warren vs. Farquarharson, 4 Baxt., 484, a judgment of February, 1861, was entered satisfied in 1862, upon payment in Confederate money, which the court set aside in 1866, and revived the judgment; *held*, without jurisdiction and void. "If the court could do this, without notice, three years after the satisfaction was entered, it might be done ten years afterward."

In Swift vs. Allen, 55 Ill., 303, a decree at one term, dismissing a bill generally, was amended at the next, the amendment being only to show the ground of the dismissal, clearly "within the breast of the court," to have been that there was an adequate remedy at law; *held*, void. "The amendment having, thus, been made without notice to the defendant in this suit, it is as to him a nullity. The court acted without jurisdiction. It could no more impair his rights by an order made in a case of an amendment, without first bringing him before the court, than it could do so by pronouncing a new decree. The order making the amendment was not merely erroneous, as suggested by counsel.

It was absolutely void for want of jurisdiction, and could be assailed in a collateral as well as in a direct proceeding."

What the court thus regards as *reductio ad absurdum*, namely, the granting of a new judgment or decree, without notice, after the term in which a final decree has already been rendered, is precisely the action which the plaintiff in error is here to insist is valid.

After the term, "the court can make no order changing, modifying or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance." Perkins vs. Haywood, 132 Ind., 95, 100. Equally to the point are Bryant vs. Vix, 83 Ill., 1; Board vs. Brown, 14 Ind., 191; Jenkins vs. Conner, 55 Ind., 21 Durre vs. Brown, 7 Ind., 127, 132; Elsner vs. Shirley, 80 Iowa, 30; Montgomery vs. Merrill, 36 Mich., 97; Stringer vs. Echols, 42 Ala., 61; Harper vs. Sugg., 111 N. C., 327; Kenny vs. Lyons, 21 Iowa, 280. See, also, many authorities cited *supra*, under the principal question discussed.

As above noted, a court at common law could regain jurisdiction over parties out of court under a final judgment rendered by itself at a prior term, for correction of error or mistakes of fact, only by a writ of error *coram vobis*, served upon the adverse party; the writ being succeeded in modern practice by motion, and the service of it by notice. No authority is cited in the opposing Brief, and it is confidently claimed none exists, holding that a final judgment in favor of a party at one term may be displaced by a heavy money judgment against him at another and long subsequent one, without motion and notice, or opportunity to be heard.

The judgment below, it is respectfuly submitted, was wholly in accord both with legal principles and the absolute requirements of common justice, and should be affirmed.

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